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ORIGINAL

March 31, 1993

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.--Room 222
Washington, D.C. 20554

RECEIVED

MAR 31 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 92-317
Milford, Iowa

Dear Ms. Searcy:

Enclosed for filing are an original and six copies of a Reply to Opposition to Motion to Enlarge the Issues filed by Milford Broadcasting Company. Attached to the Motion as Exhibit 1 is an affidavit of Mr. B. Benjamin Evans. The affidavit is signed by Mr. Evans and his signature has been attested to by a notary. However, only a copy of the affidavit is being filed today. The original affidavit will be filed as a supplement upon its arrival in Washington, D.C.

If there are any questions concerning this matter, please contact the undersigned counsel to Milford Broadcasting Company.

Sincerely,


Linda J. Eckard

cc: Hon. Edward Luton
Paulette Laden, Esq.
Richard F. Swift, Esq.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 31 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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| In re Applications of |) | MM Docket No. 92-317 |
| |) | |
| MILFORD BROADCASTING CO. |) | File No. BPH-911003MI |
| |) | |
| SHARON A. MAYER |) | File No. BPH-911004MG |
| |) | |
| For Construction Permit for a New |) | |
| FM Station on Channel 271C2 |) | |
| in Milford, Iowa |) | |

To: Honorable Edward Luton
Administrative Law Judge

REPLY TO OPPOSITION TO MOTION TO ENLARGE THE ISSUES

Milford Broadcasting Company ("MBC"), by its attorneys and pursuant to Section 1.294 of the Commission's Rules, hereby replies to the Opposition to Motion to Enlarge The Issues filed by Sharon A. Mayer ("Mayer") on March 19, 1993. Mayer has opposed the enlargement of the issues in this proceeding to include financial qualifications and site suitability issues. However, there are substantial and material unresolved questions which require exploration. Denial of the Motion to Enlarge the Issues could result in permitting Mayer to continue in this proceeding with a proposal for a facility that may not be capable of being constructed for the amount budgeted and at the site specified. In support of its request, MBC respectfully states as follows:

**MAYER HAS NOT ADEQUATELY DEMONSTRATED THAT HER PROPOSAL IS
REALISTIC AND CAPABLE OF EFFECTUATION**

1. MBC seeks to add a financial qualifications issue against Mayer due to the fact that she has estimated the total cost of constructing and operating the station for three months without revenue to be \$174,650 and has a commitment from the Farmers Savings Bank for that exact amount. This estimate is less than 50% of what MBC has estimated it will cost for the same facility.¹ It

new equipment. Mayer states that she will rely upon a combination of new and used equipment to construct the facility and determined the availability of used equipment prior to filing the application. (See Opposition, Declaration of Sharon A. Mayer.) Beyond that, Mayer has told us nothing. Mayer has provided no details as to what specific items are included in the estimate, what those items cost, which items will be acquired new or used, and upon what sources of used equipment Mayer will rely. These are important questions that Mayer has not even attempted to address.²

4. In challenging the proposition that her estimate is unrealistic, Mayer offers only one concrete piece of information which alone is insufficient to rebut MBC's claim that a substantial question has been raised. Exhibit No. 1 to Mayer's Opposition is an advertisement from the March 8, 1993, issue of Broadcasting & Cable Magazine purportedly offered to show that as of that date, a used 400 foot tower, 400 feet of used coaxial cable and a new 6 bay antenna were available for purchase. It is puzzling that Mayer has relied upon a current issue of a trade publication to document the cost and availability of used equipment that she claimed to have "researched" in 1991 prior to filing her application. (See Opposition, Declaration of Sharon A. Mayer.)

²Indeed, Mayer could easily have dispelled any doubts about the estimated cost of construction and operation of the station for three months without revenues by submitting the written budget that she prepared. However, for some unexplained reason, Mayer is adamantly opposed to submitting that document. (See Mayer's Opposition to Supplemental Request for Production of Documents.)

5. Nonetheless, the cost and availability of such equipment today does not support Mayer's claim that her estimate in 1991 was reasonable and realistic. Unlike new equipment, there is no assurance that the type of used equipment needed and of sufficient quality will be available at the time the station is constructed.³ Indeed, Mayer's citation to the advertisement in Broadcasting & Cable illustrates this point. Mayer has noted the availability in March 1993, some 18 months after filing her application, of a 400 foot tower, coaxial cable and a 6 bay antenna. Mayer proposes to construct a 468 foot tower. (See Mayer's Application, as amended February 28, 1992.) In the likely event that Mayer would not be able to find a used 468 foot tower at the time she commenced construction, her choices would be either: (a) to purchase a tower of lesser height and seek to add a section(s); or conversely, (b) to purchase a tower of greater height and partially dismantle portions which could result in potential structural concerns requiring additional reinforcement. Each of these options would require the expenditure of additional funds which it is apparent Mayer has failed to take into account.

³It is axiomatic that care must be taken when selecting used broadcast equipment. First, equipment is specifically designed for particular uses and cannot always be retrofitted from one use to another without modification and such modifications cost money. For example, towers are designed to withstand certain weather conditions, such as wind and ice, and a tower suitable for one geographic location may not be suitable for a different location. Second, there is a potential for used equipment to be of lesser quality than new equipment thus necessitating repairs or modifications at the installation or operational phases. Mayer has not offered any evidence that she considered and budgeted for such modification.

6. The advertisement specifies only three items for sale in connection with the tower. There are numerous other costs associated with the construction of the tower which are not identified in the advertisement relied upon by Maver. For example.

provide a breakdown of its estimate).

MAYER HAS FAILED TO DISPEL QUESTIONS ABOUT SITE SUITABILITY

9. MBC also seeks the addition of an issue to determine if Mayer's site is suitable for the construction of a 468 foot tower. MBC raised this question due to the size and configuration of the property, government imposed restrictions, and advice received by Mayer's own engineering consultant. While Mayer has tried to rebut

there is a city water tower located on the north side of the property about halfway between the east and west boundaries of the property. (See Motion to Enlarge, Exhibit 6.) Third, there is a requirement by the Town of Wahpeton, the community in which the property is located, which requires a 35 foot setback from the

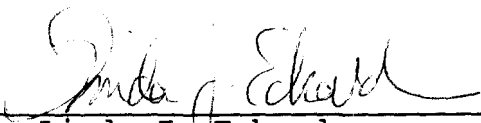
12. MBC raised questions concerning the suitability of Mayer's site in its Motion to Enlarge the Issues. From Mayer's Opposition, it is clear that she is unaware of the restrictions on the property that she has selected and has failed to account for significant factors in calculating the usable area of the property. Thus, the questions that MBC has raised have not been adequately answered and a substantial and material question of fact, whether the site selected by Mayer is suitable for its intended purpose, remains unanswered.

CONCLUSION

13. The issues in this proceeding should be enlarged to explore the many unanswered questions about Mayer's cost estimate and the suitability of her proposed site. Financial qualifications and site suitability are two basic and integral elements of an applicant's proposal. The consequences of not adding these issues now is that her proposal will remain untested and the truth, that Mayer may not be capable of constructing the facility for the amount budgeted and at the site specified, may be discovered only after Mayer is awarded the permit. At that point it will be too late to test her proposal and the result may be a delay in service to the public.

For the foregoing reasons, MBC requests that the issues be enlarged in this proceeding to explore Mayer's financial qualifications and the suitability of the proposed site.

Respectfully submitted,
MILFORD BROADCASTING COMPANY

By: 
Linda J. Eckard
Pamela C. Cooper

Roberts & Eckard, P.C.
1919 Pennsylvania Ave., N.W.
Suite 222
Washington, D.C. 20006

Its Attorneys

EXHIBIT 1

AFFIDAVIT

COUNTY OF OZAUKEE

STATE OF WISCONSIN

} SS:

B. BENJAMIN EVANS, being duly sworn upon oath deposes and says:

That his qualifications are a matter of record with the Federal Communications Commission;

That he is a Consulting Telecommunications Engineer in Wisconsin, and is a partner in the firm of Evans Associates;

That this firm has been retained by Milford Broadcasting Company to prepare this engineering exhibit;

That he has either prepared or directly supervised the preparation of all technical information contained in this engineering statement, and that the facts stated in this engineering statement are true of his knowledge, except as to such statements as are herein stated to be on information and belief and as to such statements he believes them to be true.

B. Benjamin Evans

ENGINEERING STATEMENT

This Engineering Statement and the attached exhibit have been prepared by B. Benjamin Evans of Evans Associates, Consulting Communications Engineers in Thiensville, Wisconsin, on behalf of Milford Broadcasting Company, applicant for a new FM station in Milford, Iowa. The purpose of this engineering exhibit is to respond to the engineering exhibit of Sharon A. Mayer, the competing applicant for the Milford allotment, concerning the suitability of Mayer's proposed transmitter site.

This affiant has examined the engineering statement by the engineering counsel for Sharon Mayer, dated March 18, 1993. In addition, this affiant has examined information concerning government agency requirements for commercial land use which directly impacts upon the construction of the proposed tower.

The 468-foot transmitting tower proposed by Mayer cannot be configured as shown in Mayer's engineering exhibit of March 18th, due to the presence of a water tower on the property, local setback requirements, and state highway right-of-way requirements.

Attached as Figure 1 is a horizontal plan diagram of the Mayer transmitter site showing the overall dimensions of the property, and the usable dimensions as determined by the above factors. The water tower site takes up 9200 square feet of the property. The local setback requirement for commercial construction is 35 feet front and rear, and 8 feet on either side. The Iowa Department of Transportation has established a right-of-way from the road running along the east side of the property, which starts at 60 feet from the center of the road on the north end, and widens to 120 feet. Due to these three factors, the amount of usable land left for the construction of the tower is 4.3 acres.

Given the above constraints, the tower guying system must be configured as shown in Figure 1 for maximum guying ratio. The maximum guying ratio that could be obtained for a guyed 465-foot tower is 58%, not 65.6% as reported in Mayer's engineering exhibit. This would generally increase the cost of the tower.

FIGURE 1

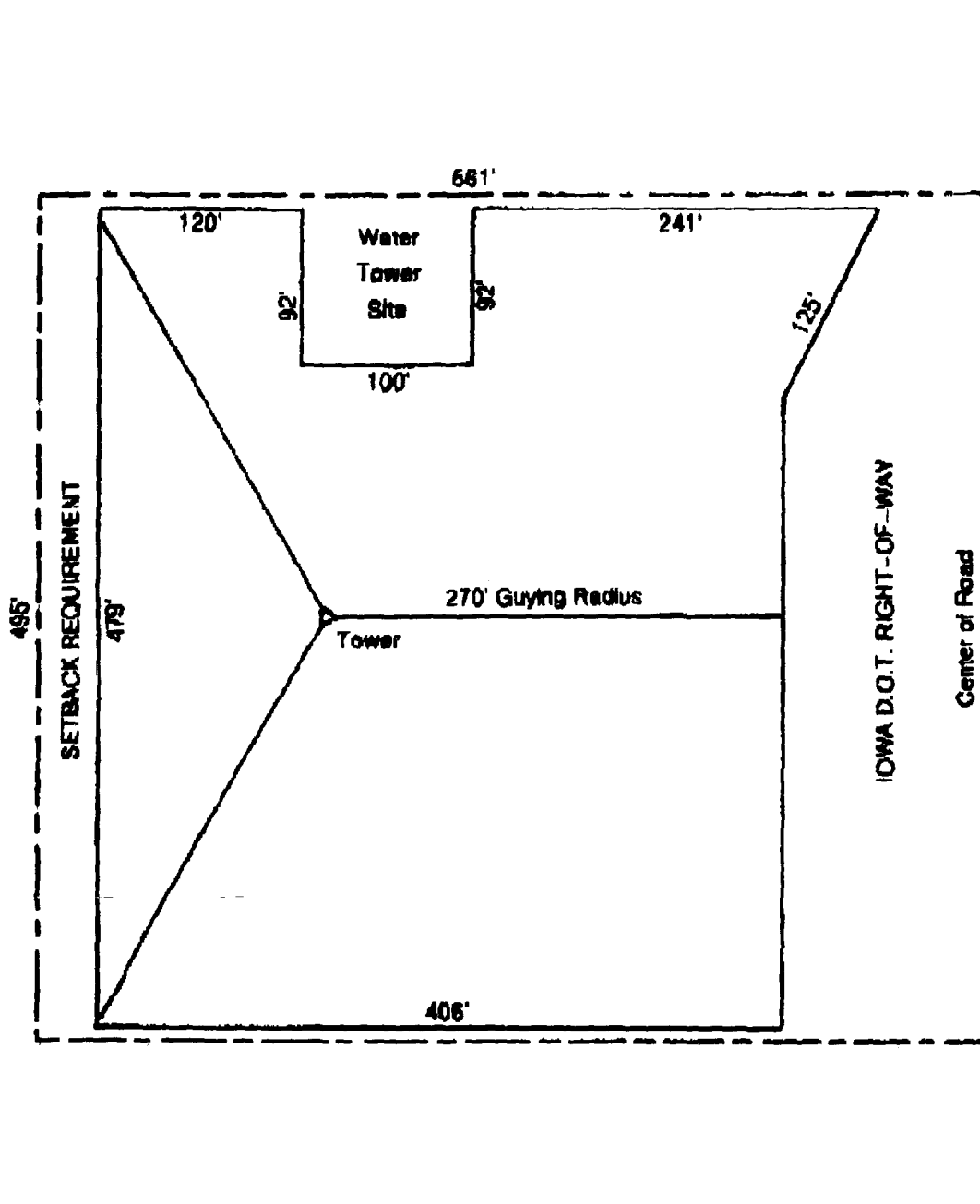


EXHIBIT 2

- f. Performance characteristics related to the emission of noise, vibration and other potentially dangerous or objectionable elements.
6. The special permit issued may include time limits, and other conditions or safeguards deemed necessary or appropriate by the Board. Violations of such conditions and safeguards shall be deemed a violation of this Ordinance and punishable under the provisions of this Ordinance. In addition, the special permit in connection with such violation, shall be subject to revocation by the Board.
7. The Board of Adjustment may deny the application for a special use permit, if in conflict with this Ordinance including Paragraph 5 of this section.
8. Whenever an application for special use permit has been denied by the Board, no new application for special permit including the same property or any portion thereof shall be filed or considered by the Board until six months shall have elapsed from the date of the official denial of the first application.

SECTION 7. HEIGHT REGULATIONS

No principal building shall exceed thirty-five feet in height or two and one-half stories, whichever is lesser.

SECTION 8. LOT AREA, LOT FRONTAGE AND YARD REQUIREMENTS

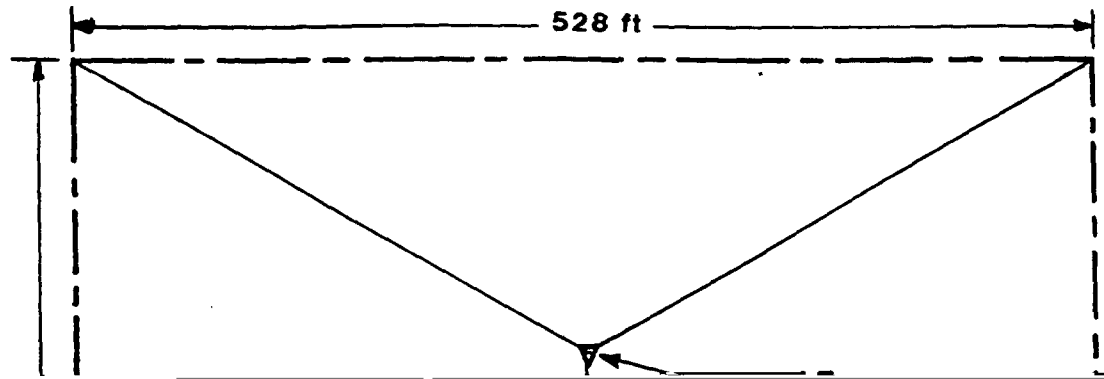
| <u>Principal Use</u> | <u>Lot Area</u> | <u>Lot Width</u> | <u>Front Yard</u> | <u>Side Yard</u> | <u>Rear Yard</u> |
|----------------------|-----------------|------------------|-------------------|------------------|------------------|
| Commercial | 9,000 sq. ft. | 75 ft. | 35 ft. | 8 ft. | 35 ft. |

The dimensions shown above for front yard, side yard, and rear yard shall pertain to the required 'Set Back' of a structure from the front, side and back lot lines. 'Structure' shall include, but not be limited to, not only the structure proper but all associated appurtenances, both attached and unattached, such as roof overhang, entrance landings and stairs, decks, patios, porches, garages, gazebos, utility buildings, etc. The required set backs shall also apply to hard-surfaced drives and walks except when they terminate at the lot line as is the case when a driveway is extended to the street right of way for access.

SECTION 9. OPEN SPACE REQUIREMENTS

- A. Any building or land use in the Commercial District which abuts upon the lakeshore of West Okoboji shall comply with the following:
 1. On each lot there shall be provided an open space equal to at least twenty-five percent of the total lot area; said space shall be unencumbered with any structure, cement, blacktop or hard-surface or used as off-street parking and shall be landscaped and well maintained with grass, trees and shrubbery, except for areas used as pedestrian walks. Ingress-egress drives shall not exceed two twenty foot lanes which are separated by open space.

EXHIBIT 3



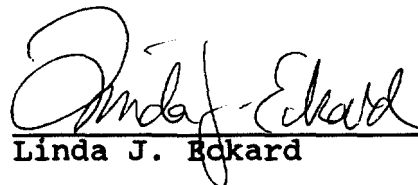
CERTIFICATE OF SERVICE

I, Linda J. Eckard, an attorney with the law firm of Roberts & Eckard, P.C., hereby certify that I have sent a copy of the foregoing REPLY TO OPPOSITION TO MOTION TO ENLARGE THE ISSUES by first class U.S. mail, postage prepaid, on this 31st day of March, 1993, to the following:

Honorable Edward Luton
Administrative Law Judge
Federal Communications Commission
2000 L Street, Second Floor
Stop Code 0900
Washington, DC 20554

Paulette Laden, Esq.
Hearing Branch, Enforcement Division
Mass Media Bureau
Federal Communications Commission
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Tierney & Swift
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Counsel for Sharon A. Mayer


Linda J. Eckard